

CARPENTER, J.

Facts

In April 2003, New Castle County solicited bids regarding the Little Mill Interceptor Sanitary Sewer Replacement - Section 3b, Contract No. 2001-18, Project No. 219201 (the “Project”).¹ On April 10, 2003, prior to accepting any bids, the Department of Special Services for New Castle County conducted a pre-bid meeting allowing potential bidders to review information about the project and ask any questions they may have. Thereafter, despite not attending the pre-bid meeting, Mumford & Miller Concrete (“Mumford”) submitted a bid proposal using the Proposal and Schedule of Prices form (“Proposal”) provided by the County.² Mumford’s bid was for a total of \$541,545.60. This was the successful bid and led to the execution of a contract for the Project between Mumford and the County on June 9, 2003 (the “Contract”).³

It appears that, at some point during the Project, Mumford advised the County that less rock was being encountered during the excavation process than was anticipated by them and less than the estimate given by the County in the bid

¹Def. Mot. Summ. J., Ex. 3.

²Pl. Opp’n, Ex. 1.

³Def. Mot. Summ. J., Ex. 3.

package, causing Mumford to request an adjustment to the Contract.⁴ Despite what appears to be conversations between the parties regarding this development, an agreed amendment was not reached. Mumford continued with the Project seemingly with the understanding that appropriate adjustments would be negotiated at the end of the Project. Upon completion, only 264 cubic yards of rock were actually required to be excavated by Mumford, which was 2,432 cubic yards less than anticipated in the bid information.⁵ Both parties agree this accounts for a 93% decrease in the amount of rock estimated to be removed, however, the parties disagree whether additional compensation is owed.

Mumford requested an additional payment of \$161,389.31 based on the changed conditions, and the County refused.⁶ Accordingly, the County paid Mumford for the installation of the pipe and for the excavation of 264 cubic yards of rock based on the actual amounts removed by Mumford.⁷ Mumford disputes the County's calculated amounts and is seeking full payment of their bid price since Mumford relied on the County's estimate when the bid was placed.

⁴*Id.* at Ex. 4.

⁵*Id.* at Ex. 14.

⁶Am. Compl. ¶20.

⁷Mot. Summ. J. Tr., 33, April 17, 2006.

Unable to resolve the dispute, Mumford filed this cause of action for breach of contract against the County. The County has answered and subsequently filed a motion for summary judgment. Pursuant to the Court's request, both parties fully briefed the issues and provided a complete copy of the Contract to the Court. This is the Court's decision on the County's Motion for Summary Judgment.

Standard of Review

Summary Judgment is appropriate when the moving party has shown there are no genuine issues of material fact, and as a result, it is entitled to judgment as a matter of law.⁸ In considering such a motion, the Court must evaluate the facts in the light most favorable to the non-moving party.⁹ Summary judgment will not be granted when the record reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.¹⁰

Discussion

The crux of the issue before this Court is whether Mumford is entitled to additional compensation since the quantity of rock actually excavated was

⁸*Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979); *Schueler v. Martin*, 674 A.2d 882, 885 (Del. Super. Ct. 1996).

⁹*Pierce v. Int'l. Ins. Co. of Ill.*, 671 A.2d 1361, 1363 (Del. 1996).

¹⁰*Ebersole v. Lowengrub*, 180 A.2d 467, 468-469 (Del. 1962).

significantly less than the estimate of rock provided by the County. To resolve this dispute, the Court must first examine and interpret the Contract. Once the terms of the Contract are established, it must then be determined whether, in the middle of the Project, Mumford reasonably relied to its detriment on the County's pledge to reexamine the Contract upon completion.

The interpretation of a contract is a question of law:

Under Delaware law, purported contracts are to be "construed as a whole, to give effect to the intentions of the parties." If the contract language is clear and unambiguous, then the parties' intent is ascertained by "a reasonable reading of the plain language of the policy." Extrinsic evidence is only used if the parties' intent cannot be derived from the plain meaning of the contract.¹¹

Contract terms are not ambiguous because the contracting parties disagree on the meaning of certain terms, "[r]ather, a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings."¹²

In the case at hand, the Contract consists of a number of documents: 1) the invitation and instructions to bidders; 2) the Proposal; 3) the executed Contract and

¹¹*Sussex Equipment Co. v. Burke Equipment Co.*, 2004 WL 2423841, at *1 (Del. Super. Ct.) (citing *Rhone-Poulenc Basic Chems. Co. v. American Motorists Inc. Co.*, 616 A.2d 1192, 1195 (Del. 1992)).

¹²*E.I. duPont de Nemours & Co. v. Allstate Ins. Co.*, 693 A.2d 1059, 1061 (Del. 1997) (citations omitted).

bond; 4) New Castle County Standard Specifications for Construction (1975) (“Standard Specifications”); 5) Supplemental Specifications; 6) Special Provisions; 7) a plan or notice to proceed and 8) written Change Orders and Supplemental Agreements.¹³ The dispute surrounds two lines within the Proposal, and to better comprehend the issue, an understanding of the Proposal is necessary.

The Proposal is a form provided by the County and completed by each bidder when placing its bid.¹⁴ It indicates each item required to complete the Project and it requests unit prices and total prices for each item. The Proposal is divided into two sections. The first section consists of contract items and encompasses Line 1 through Line 16.¹⁵ Following Line 16, and separating the two sections, is a subtotal for the Proposal of all contract items that will be required in order to properly complete the Project.¹⁶ The second section of the Proposal consists of Lines 18 through 24, identified as utility contingent items.¹⁷ For each contingent item, the County

¹³Def. Mot. Summ. J., Ex. 3, Standard Specifications at I-5.

¹⁴Pl. Opp’n, Ex. 1.

¹⁵Contract Items, as defined by Section 10.01-1 of the Standard Specifications, are those “items of work specifically described and for which a price, either unit or lump sum, is provided.” Def. Mot. Summ. J., Ex. 3 (Standard Specifications) at I-5.

¹⁶Line 17 is the initial expense required by a bidder and is irrelevant to this issue.

¹⁷The Contract defines Contingent Item, but does not specifically define Utility Contingent Item. Nevertheless, it is clear that the definitions fit Utility Contingent Item. Section 10.01-1 of the Standard Specifications defines a contingent item as one that is “included in the

approximated a quantity and requested both a unit price and a total price for each item. This allows for all bids to be fairly compared based upon the same estimates. The final line of the Proposal is the total amount bid for both sections.¹⁸

This dispute specifically centers around Line Item Nos. 3 and 21. Line Item No. 3 requests a bid amount for the installation of a 12-inch PVC pipe to create a sanitary sewer. The County approximated 3,166 linear feet of PVC pipe would be required for the Project, and Mumford placed a bid of \$34.00 per linear foot.¹⁹ As indicted above, Line Item No. 3 is a contract item, thus it is either a cost Mumford will incur or work which Mumford must complete. Conversely, Line Item No. 21 falls within the contingent item section, and seeks a bid amount for the excavation of rock. In this item, the County sought a unit price from Mumford in the event rock must be excavated during the Project, and Mumford placed a bid of \$48.00 per cubic yard.²⁰ The County approximated 3,696 cubic yards of rock to be excavated.

Proposal merely for the purpose of obtaining a contract price *in case it may be needed.*” (emphasis added) Def. Mot. Summ. J., Ex. 3 (Standard Specifications) at I-5.

¹⁸Pl. Opp’n., Ex. 1.

¹⁹Based on the County’s estimate, Mumford’s total bid for Line Item No. 3 equaled \$107,644.00.

²⁰Based on the County’s estimate, Mumford’s total bid for Line Item No. 21 equaled \$177,408.00.

It is Mumford's contention that, since it relied on the County's estimates in placing the above bid, Mumford is now entitled to a supplemental agreement pursuant to Section 10.04-3 of the Standard Specifications.²¹ Mumford argues that the amount of rock actually removed to complete the Project was significantly less than (more than 25%) the amount the County estimated for the Proposal in Line Item 21. Thus, Mumford argues that it is not being fairly compensated for the removal of 3,432 cubic yards of soil which was necessary to complete the Project.

Mumford's interpretation of the Contract is flawed for two reasons. First, according to the terms of the Contract,²² a contingent item only becomes part of the compensation paid if that item is required to complete the Project. Rock excavation is a contingent item, and Mumford would only receive compensation for the removal of rock if rock excavation was required, and then only up to the amount of rock actually removed. It logically follows that if rock excavation is not required in order

²¹Section 10.04-3 of the Standard Specifications, titled "Increase or Decrease of Quantities and Alterations" states, in pertinent part:

When total alternations involve an increase or decrease of more than 25% of the total cost of the work calculated from the original contract price, or an increase or decrease of more than 25% in the quantity of any one major contract item, or an extension or shortening of the project of more than 25% of the length shown on the Plans, either party shall be entitled to demand a supplemental agreement on that portion of the work above 125% or below 75% of the quantity stated.

Def. Mot. Summ. J., Ex. 3 (Standard Specifications) at I-22.

²²See footnote 11 above.

to install the sewer, there would be no additional payment to Mumford for rock excavation. Thus, because it is a contingent item, Section 10.04-3 cannot be triggered in this instance.

Further, prior to the acceptance of any bids, the County made it clear that the accuracy of subsurface information provided to the bidders was not guaranteed. First, the Proposal itself indicated “*Approximate Quantity*” for each requested bid item, and this includes the amount of rock to be excavated.²³ Second, Section 1.01(9) of the Special Provisions plainly advised each bidder that the estimates regarding subsurface consistency were not exact.²⁴ The clauses within Section 1.01(9) are clear; the

²³Pl. Opp’n., Ex. 1.

²⁴Special Provisions, Section 1.01(9), titled “Information not Guaranteed,” states the following, in pertinent part:

All information given on the Drawings or in the other Contract Documents relating to subsurface and other conditions, natural phenomena, existing pipes or other structures is from the best sources at present available to the Owner. All such information is furnished only for the information and convenience of bidders and is not guaranteed.

It is agreed and understood that the Owner does not warrant or guarantee that the subsurface or other conditions, natural phenomena, existing pipes or other structures encountered during construction will be the same as those indicated on the Drawings or in the other Contract Documents.

....

Data on indicated subsurface conditions are not intended as representations or warranties of accuracy or continuity between soil borings. It is expressly understood that New Castle County or its Engineer will not be responsible for interpretations or conclusions drawn therefrom by Contractor. Data are made available for the convenience of Contractor.

Def. Mot. Summ. J., Ex. 3 (Special Provisions) at SP-4.

County cannot be responsible for the representations made, and the numbers were provided solely to assist the bidder. Lastly, it was again stated at the pre-bid meeting that soil borings were not taken at the Project site and the rock quantity was simply an estimate.²⁵ For these reasons, Mumford should have been aware of the possibility that more or less rock may be encountered once the Project began, and Mumford should have bid accordingly.

The second flaw of Mumford's interpretation is that soil excavation is included in the price of the installation of the PVC pipe on Line Item No. 3 of the Proposal. Section 31.06-4²⁶ of the Supplemental Specifications clearly indicates the cost of soil removal is included in the cost associated with installing the PVC pipe. Section 31.06-4 is not ambiguous; it specifically states "excavation" is to be included "in the contract lump sum and/or unit price per lineal foot for the particular type of completed pipe specified on the plans." Further, there is not another section within

²⁵Def. Mot. Summ. J., Ex. 3 (Addendum #1 of Proposal) ("No soil borings were taken for this work. The rock quantity was estimated."). Mumford did not attend this meeting.

²⁶Section 31.06-4 of the Supplemental Specifications to the Standard Specifications states, in pertinent part:

Excavation and backfill for sewer and water mains, pipe culverts, structural plate pipe and arch structures shall be included in the contract lump sum and/or unit price per lineal foot for the particular type of completed pipe specified on the plans...and shall include all excavation, sheeting shoring, de-watering, storing, re-handling of material, forming and shaping bed, backfilling, compacting and all labor, materials and equipment incidental to complete the item. (emphasis added)
Def. Mot. Summ. J., Ex. 3 (Supplemental Specifications), at SS-4.

the Contract to account for the excavation of soil, and specifically the Proposal does not include a separate line item for soil excavation.²⁷ Obviously soil will be removed to install the sewer line, and since it is otherwise absent from the Proposal, it is clear the parties intended to include the cost to remove soil in Line Item No. 3. If Mumford wanted to fully protect its potential cost, it should have placed its bid as if 100% of the material to be excavated was soil and should have included this amount within Line Item No. 3 to ensure it received compensation for any soil removed. Mumford could have then placed a separate bid amount within Line Item No. 21 for any additional cost Mumford would incur should rock be encountered. Mumford's failure to proceed in such a manner potentially allowed them to obtain a competitive advantage in the bid process.

Based on the above analysis, the Contract before the Court is not ambiguous and the Court need only look to the plain meaning of the Contract to give effect to the parties' intent. It is clear that the removal of soil was included in the Proposal within Line Item No. 3, and Mumford was compensated for any soil removed based on its bid therein. It is also clear that Line Item No. 21 for rock excavation was to be bid as a utility contingent item, and Mumford would be compensated based on the

²⁷Am. Compl. ¶12.

amount of rock it removed, if any. Accordingly, Mumford should receive compensation based on these terms within the Contract.

Before leaving this subject, the Court cautions that while it has accepted the argument of the County regarding this Contract, the County's position may not be in the best interest of its citizens nor lead to the most economically advantageous contracts. It is likely that future bidders will not rely upon the estimates made by the County and bid the worse case scenarios. This may inevitably lead to higher construction cost for the County, but that is a policy issue not a contractual one.

While the Court has interpreted the Contract and the initial intent of the parties, that does not completely resolve this dispute. Mumford has also asserted that, during the Project, it informed the County of differing site conditions upon the discovery of less rock than the County had estimated, and Mumford requested an equitable adjustment of compensation. Discussions between Mumford and the County appeared to have taken place, and it has been represented that the County even made offers to adjust the Contract, which Mumford found were inadequate and were rejected. In addition, it is asserted that the Project was completed by Mumford based upon oral representations that adjustment would be made based upon the new developments found and encountered. It is unclear at this time if this Contract was amended, rescinded, breached or satisfactorily completed based upon comments, if any, made by agents of the County.

A motion for summary judgment must be viewed in the light most favorable to the non-moving party, and here that is Mumford. Thus, the Court must assume these negotiations occurred, that Mumford detrimentally relied on the County's statements that it would reasonably renegotiate terms of the Contract to ensure Mumford was properly compensated for the work on the Project, and that Mumford completed the Project to its detriment and should now be appropriately compensated. This remains a material question of fact in dispute, and is one for the jury to decide. As a result, because there are material facts in question as to whether the Contract remained in force as written throughout the completion of the Project, the issues of *quantum meruit* and unjust enrichment are not ripe for decision by this Court. The parties may address either issue at a later and more appropriate time. Accordingly, the County's Motion for Summary Judgment is hereby denied.

Conclusion

For the foregoing reasons, the County's Summary Judgment Motion is hereby DENIED.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.